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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 637

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

Authorities Cited.

Cases.

Statutes and Rules.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Robert Stueber and James M. Stueber, plaintiffs-appellees, below, by their duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 5, 1949 (R. 444), rehearing denied, February 3, 1949 (R. 445).

In support of this petition, your petitioners respectfully show:

OPINIONS BELOW.

The District Court did not prepare or publish an opinion. The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 171 F. (2d) 777.

JURISDICTION.

This Court's jurisdiction is evoked pursuant to the Act of June 25, 1948 c. 646, Sec. 62, Stat. 992, effective September 1, 1948, Title 28, § 1254, U. S. C.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioners,[1] citizens of the State of Illinois, recovered judgments rendered upon the verdicts of a jury in a consolidated action for malicious prosecution against the respondent,[1] a Delaware corporation, in the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Chicago. The damages assessed for the plaintiff, Robert Stueber, was $20,000.00 and for the plaintiff, James M. Stueber, $12,500.00 (R. 388). Defendant thereupon appealed to the United States Court of Appeals, Seventh Circuit. On January 5, 1949, the Court of Appeals reversed the judgments for a new trial (R. 444) and on February 3, 1949, denied the petition for rehearing (R. 445).

1. For convenience, the petitioners are sometimes referred to hereafter as the "plaintiffs" and the respondent as the "defendant".

The plaintiffs filed separate actions at law in the Circuit Court of Cook County, Illinois, charging that the defendant caused the plaintiffs to be falsely arrested, falsely imprisoned and maliciously prosecuted on a charge of receiving stolen property of which charge the respective plaintiffs were acquitted and exonerated upon examination in the Municipal Court of Chicago (R. 2-5, 12-14). These actions were removed by the petitions of the defendant on the ground of diversity (R. 5-7; 15-17). Thereafter the defendant filed its answers denying the allegations of the plaintiffs' complaints in each case (R. 22, 23). The separate causes of action were, upon the order of the District Judge, consolidated before trial (R. 25).

As a part of their proof, the plaintiffs introduced evidence in the form of testimony and exhibits relating to their arrest and detention. Plaintiffs testified that during the morning of September 21, 1946 they were arrested at their partnership place of business by four Chicago police officers who, over their objection, and without a search warrant, searched their basement storeroom and seized certain merchandise. They were taken to the Detective Bureau of the Chicago police department and there fingerprinted, photographed, questioned and then imprisoned in separate cells until approximately 6:00 P. M. on September 23, 1946. About 8:30 A. M. September 23, 1946, B. A. Heinrich, office manager of the defendant, received a telephone call from the Chicago police in response to which he arrived at the Detective Bureau within a half hour and signed complaints for examination charging each of the plaintiffs with the crime of receiving stolen property. About 6:00 P. M. of September 23, 1946, plaintiffs, having been booked for the crime of receiving stolen property upon the complaints signed by the defendant, were released after furnishing bail (R. 46-56; 102-108). Concerning all the foregoing,

the defendant cross-examined at length (R. 66-71; 76-79; 81-85).

The plaintiffs also proved that the defendant subsequently appeared and prosecuted the said charges in the Municipal Court of Chicago, upon which charges the plaintiffs were acquitted and exonerated by the examining magistrate (R. 109) (Pf's Ex. 8, R. 340; Pf's Ex. 20-R. 356).

The plaintiffs further proved the facts surrounding the purchase of the property alleged to have been stolen; their previous business relationships; the number of customers plaintiffs had in their respective individual businesses, and in their partnership business; their previous good reputation as honest and law-abiding citizens in the community wherein they resided and conducted their business; the injury to their reputation and the damages sustained by each of them as a result of the malicious prosecution by the defendant.

At the close of the plaintiffs' case, the defendant filed general motions for directed verdicts of not guilty, which motions were denied (R. 25-26). The Court overruled the following motion made by the defendant at the close of the plaintiffs' case:

> "May we at this time move to strike out all the testimony with reference to their detention from Saturday until the time the complaint was signed." (R. 180-181.)

The defendant proceeded with its defense, in the course of which it introduced evidence concerning the arrest and detention of the plaintiffs, their questioning by Chicago police officers, and offered in evidence testimony and exhibits relating thereto (R. 202-210; Df's. Ex. Nos. 5 and 6; R. 384 C-384 G). At the close of all the evidence the defendant moved the Court to instruct the jury to find the defendant not guilty as to the charges of false arrest and

false imprisonment, which motions were granted by the District Court (R. 385), and the jury so instructed (R. 325). The defendant then made general motions for directed verdicts of not guilty as to the charges of malicious prosecution, at the close of all the evidence, which were denied (R. 386). When the motions for directed verdicts as to false arrest and false imprisonment were granted, the court advised counsel as follows (R. 279-284):

> "By the Court: Now, I have considered this case, gentlemen. I do not believe there is sufficient evidence to go to the jury on the question of false arrest and false imprisonment, aside from the charge of malicious prosecution. In other words, I do not think there is evidence to go to the jury, sufficient evidence to go to the jury, on the question of agency of the officers prior to the time that the defendant by its office manager signed the complaint.
>
> "Accordingly, I think that the only case which I can properly send to the jury is that involving the question as to whether or not defendant is guilty of malicious prosecution."

The court further said (R. 281-282):

> "By the Court: No, from the time the complaint was signed, I think the defendants are responsible for what took place, but this question of malicious prosecution prior to the signing of the complaint, the holding of the plaintiffs was wrongful, but the defendant is not liable for it. That is my view. Now, if you want to preserve your point, I will direct the jury. If you want to dismiss, it is up to you."

Immediately following the ruling of the Court directing the jury on the charges of false arrest and false imprisonment, the defendant requested three instructions which it informed the court "referred to damages without false arrest" (R. 283). An identical instruction relating to each of the plaintiffs was given (R. 328-329). This instruction

was held by the Court of Appeals to be insufficient. When the trial Court instructed the jury to find the defendant not guilty on the charges of false arrest and false imprisonment; he also instructed the jury that the only question for the jury's determination was whether or not the defendant maliciously prosecuted the plaintiffs (R. 325).

He further instructed the jury that plaintiffs must prove that in instituting the prosecution in the Municipal Court of Chicago, the defendant acted wilfully, wantonly and maliciously, and without probable cause (R. 326). All of the instructions to the jury related solely to the conduct of defendant in signing the complaints against the plaintiffs and in prosecuting them. None of the court's instructions related to false arrest, false imprisonment, and detention and treatment of the plaintiffs, other than the instructions tendered by the defendant and given by the court favorable to the defendant that the jury find defendants not guilty on the charges of false arrest and false imprisonment and two identical instructions which the Court of Appeals held were not sufficient so as to be understood by the jury. These instructions are hereinafter quoted verbatim (R. 328).

No further motion was made by the defendant nor did it request instructions or other action by the court with respect to the evidence and exhibits in the case, which related to the charges of false arrest and false imprisonment.

The Court gave special interrogatories as follows:

> "State whether or not defendant wilfully, wantonly, and maliciously, and without probable cause prosecuted plaintiff, Robert Stueber. Answer Yes or No."

A similar interrogatory was given as to the plaintiff James Stueber. These interrogatories were answered in the affirmative by the jury.

The jury found by its general verdict in favor of the

plaintiffs and assessed damages in the sum of $20,000.00 as to Robert Stueber, and as to James Stueber, $12,500.00 (R. 387).

When the motion to strike the testimony relating to the detention of the plaintiffs was made, there was still before the Court and the jury, the charges of false arrest and false imprisonment as well as of malicious prosecution. The motion to strike had not been preceded by any objections to the evidence introduced by the plaintiff; all of the testimony and exhibits (R. 164-165) relating to the arrest and detention of the plaintiffs had been admitted without a single objection by the defendant.

The Court of Appeals held (R. 438-443) that it was properly a question for the jury whether all of the facts and circumstances proved the charge of malicious prosecution; that there was no error in overruling the motions for directed verdicts; that there was no error in the District Court's ruling on the giving and refusing of instructions. The Court of Appeals, however, held that the evidence with respect to the arrest and detention of the plaintiffs by the police, prior to the time the complaints for examination were signed by the defendant, was prejudicial and that the District Court erred in denying the motion to strike made at the close of the plaintiffs' case. In arriving at this conclusion, the Court of Appeals criticized the given instruction tendered by the defendant itself as not sufficient to overcome the alleged error in denying the motion to strike, saying (R. 442):

> "True, the court charged the jury that if they found for plaintiffs then in determining the damages, they should exclude such damages as might have been suffered by plaintiffs as a result of illegal acts. To one skilled in the law this would probably mean that the court had in mind the acts of the police during their detention of plaintiffs prior to the issuance of the

complaint. But we do not think the charge sufficient to advise the jury that defendant was not to be charged with anything done by the police prior to the issuance of the complaints."

The given instruction that was criticized in the above quoted language is as follows (R. 328):

"You are further instructed that if you find the defendant guilty, as charged by the plaintiff Robert Stueber, of malicious prosecution of said plaintiff following the signing of the complaint by defendant's employee, then you should still exclude from your consideration of damages, if any there were, such damages as may have been suffered by said plaintiff as a result of illegal acts, if any there were, committed against said plaintiff prior to the time when the complaint was signed.

"You are further instructed that if you find the defendant guilty, as charged by the plaintiff James Stueber, of malicious prosecution of said plaintiff following the signing of the complaint by defendant's employee, then you should still exclude from your consideration of damages, if any there were, such damages as may have been suffered by said plaintiff as a result of illegal acts, if any there were, committed against said plaintiff prior to the time when the complaint was signed."

The Court of Appeals found no other error in the record of this case. Its opinion does not disclose that the motion to strike was not preceded by objections to the evidence sought to be stricken or that the instructions held by it to be insufficient to overcome the alleged error of the District Court in denying that motion was an instruction that had been given by the District Court at the request of the defendant.

QUESTIONS PRESENTED.

I. Whether the Court of Appeals deprived plaintiffs of their right to trial by jury in presuming the jury too ignorant to understand a simple instruction limiting the evidence to be considered by the jury, in conflict with the applicable decisions of this Court.

II. Whether a motion to strike testimony is proper:

(a) When not preceded by objections to the testimony sought to be stricken;

(b) When it fails to specify precisely the evidence sought to be stricken; and

(c) The matter of the time when a motion to strike testimony may properly be made; and upon whom rests the duty to secure proper instructions to the jury to exclude testimony.

III. Whether the Court of Appeals erred in reversing for harmless error, contrary to Rule 61 of the Federal Rules of Civil Procedure.

IV. Whether in the light of the entire record, the action of the Court of Appeals in reversing the judgment of the District Court for denying a motion to strike testimony admitted without objection, constitutes such a clear departure from the accepted and usual course of judicial proceedings requiring the exercise of this Court's power of supervision.

REASONS FOR GRANTING CERTIORARI.

I.

The Court of Appeals Deprived Plaintiffs of the Right to a Trial by Jury, by Presuming the Jury Too Ignorant to Understand a Simple Instruction Limiting the Evidence to Be Considered by the Jury, in a Way Probably in Conflict With the Applicable Decisions of This Court.

The Court of Appeals reversed the judgments of the District Court rendered upon the verdicts of a jury. In its opinion by District Judge Lindley, it held that the question was properly for the jury, whether all the facts and circumstances in evidence proved the charge of malicious prosecution; that there was no error in overruling the motions for directed verdicts; that there was no error in the District Court's ruling on the giving and refusing of instructions. However, the Court of Appeals engaged in an examination of the evidence with respect to the plaintiffs' arrest and detention by police officers, and held that the District Court erred in denying the defendant's motion to strike certain testimony made at the close of the plaintiffs' case (R. 438-443).

In arriving at this opinion the Court of Appeals criticized as insufficient a simple given instruction tendered by the defendant itself. The Court said in substance, that had that instruction been more specific the effect of the failure to strike the testimony would have been cured, but that the jury was not skilled in law to understand what was meant by the instruction. The Court of Appeals held contrary to the decisions of this Court in indulging in the presumption that the jury was not skilled enough to understand a simple

instruction, although the record discloses no basis for that presumption.

The case of *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 458, is directly in point on a set of facts not as strong as is presented in the instant case. In the *Roy* case this Court said:

> "Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages; *and this, although the record discloses nothing justifying the conclusion that the jury disobeyed the directions of the court.* To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. *The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case.* The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. *The presumption should not be indulged that the jury were too ignorant to comprehend,* or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where

> an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval." (Italics supplied.)

It is respectfully pointed out that in the *Roy* case, above cited, the evidence was held to be *obviously irrelevant,* and was admitted *against the objection of the defendant,* while in the instant case, the allegedly prejudicial evidence was admitted *without objection,* and was *both relevant and competent* as the stage of the trial when admitted and when the motion to strike was made. *Tevis* v. *Ryan* (1914), 233 U. S. 273, 286; *Ross* v. *New York C. & St. L. R. Co.,* 73 F. (2d) 187, 188 (C. A. 6th, 1934). The Court in its charge to the jury in this case, included a simple instruction, which we quote (R. 328-329):

> "You are further instructed that if you find the defendant guilty, as charged by the plaintiff Robert Stueber, of *malicious prosecution* of the said plaintiff *following the signing of the complaint by defendant's employee,* then you should still exclude from your consideration of damages, if any there were, such damages as may have been suffered by said plaintiff as a result of illegal acts, if any there were, committed against said *plaintiff prior to the time when the complaint was signed.*" (Italics supplied.)

The court repeated this instruction relating to the plaintiff, James Stueber. This instruction was preceded by other instructions, which related solely to the question of malicious prosecution and by instructions directing the jury to find the defendant not guilty on the charges of false arrest and false imprisonment. The court charged that the only issue left for the jury's determination was the question of whether or not the defendant maliciously prosecuted the respective plaintiffs (R. 325). All of the instructions re-

lated to the defendant's conduct in signing the complaints (R. 325-330). The criticized instruction is not only simple and easy to understand but is conducive of only one obvious meaning, that defendant was not responsible for any acts committed against the plaintiffs prior to the signing of the complaint by the defendant's employee. That the criticized instruction was understood by the jury is demonstrated by their affirmative answer to the special interrogatories submitted by defendants in this case, and by their verdicts in favor of the plaintiffs.

Reading the instructions together, as they must be read, there was only one issue submitted to the jury, that is, whether in the signing of the complaints by the defendant's employee and in appearing in the Municipal Court of Chicago, and prosecuting the plaintiffs on the charges of receiving stolen property, the defendant acted maliciously and without probable cause. The criticized instruction itself limited for the jury's determination the issue of malicious prosecution of plaintiffs "following the signing of the complaints by defendant's employee", and further excluded from the jury's consideration of damages "such damages as may have been suffered by the said plaintiff as a result of illegal acts committed against plaintiff, *prior to the time when the complaint was signed*" (R. 328-329).

The Court of Appeals in its opinion discussing the criticized instruction stated (R. 442):

> "True, the court charged the jury that if they found for plaintiffs then in determining the damages they should exclude such damages as might have been suffered by plaintiffs as a result of illegal acts. To one skilled in the law this would probably mean that the court had in mind the acts of the police during their detention of plaintiffs prior to the issuance of the complaint. *But we do not think the charge sufficient to advise the jury that defendant was not to be charged*

with anything done by the police prior to the issuance of the complaints.'' (Italics supplied.)

We here point out that the instruction above quoted, when read, meets precisely the criticism directed against it by the Court of Appeals. By leveling this unjustified criticism against the instruction in question and reversing the judgment, *the Court of Appeals substituted its own opinion for the verdicts of the jury in this case.* There is nothing in the record justifying the conclusion that the jury failed to understand this instruction or that it disobeyed the directions of the court. The entire case related to the charges of illegal acts in falsely arresting, falsely imprisoning, and maliciously prosecuting the plaintiffs. How then can the jury be said to have been misled by an instruction which informed them to exclude any illegal acts committed against plaintiffs prior to the signing of the complaints?

In point also is *Rogers* v. *The Marshal,* 68 U. S. 644, 653-654, where this Court said:

> ''These views are decisive of this case. The court charged the jury that it was their province to determine whether the erasure was made 'in consequence of the interference of Hopkins, the attorney,' and the charge was right. It would have been better to use the words 'direction' or 'instruction' instead of 'interference' but, *applying the evidence of the case, it is manifest that the jury rightfully interpreted the charge. A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury.''* (Italics supplied.)

In *First Unitarian Society* v. *Faulkner, et al.,* 91 U. S. 415, 423, this Court held that instructions given by the court to the jury are entitled to a reasonable interpretation and they are not as a general rule to be regarded as the subject of error on account of omissions not pointed out by the excepting party. In this connection it is important

to note that the criticized instruction was that tendered by the defendant and given by the court and no benefit should accrue to the defendant for any error or insufficiency in this instruction.

This Court also said in *Fairmount Glass Works* v. *Cub Fork Coal Co.* (1932), 287 U. S. 474, 485, that the Appellate Courts should be slow to impute to juries a disregard of their duties and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.

The criticized instruction was too clear in itself to be misunderstood by the jury. This is certainly true in the light of the evidence of the case and the remaining instructions given by the District Court. By the mere expediency of presuming the jury not skilled enough to understand a simple instruction, the Court of Appeals for the Seventh Circuit has substituted its own judgment for the verdicts of the jury. By its action in so doing, it has deprived plaintiffs of their right to a trial by jury in contravention of the Seventh Amendment of the Constitution, and contrary to the decisions of this Court.

II.

The Decision of the Court of Appeals for the Seventh Circuit Is in Conflict With the Decisions of Other Courts of Appeal on the Following Important Questions of Federal Practice and Procedure:

A. The Matter of the Dealing With a Motion to Strike Evidence Admitted Without Objection.

B. The Matter of the Time When a Motion to Strike May Properly Be Made and Upon Whom the Duty Rests to Secure Proper Instructions to the Jury to Exclude Evidence.

C. The Proper Form of a Motion to Strike Evidence.

II A. The matter of the dealing with a motion to strike evidence admitted without objection.

In the matter of dealing with a motion to strike evidence admitted without objection, there is a conflict as follows:

With *Brockett* v. *New Jersey Steam Boat Co.*, 18 Fed. 156, 157 (C. Ct. N. D. New York, 1883) (Aff. *Steamboat Co.* v. *Brockett*, 121 U. S. 637) where it was held:

> "Two of the exceptions urged relate to the refusal of the court to strike out certain evidence which was not objected to when offered. Without discussing the question whether the evidence should have been received, had a timely objection been interposed, it is sufficient to say that the rule is well settled that a refusal to strike out in such circumstances, is not error."

With *Puget Sound Power & Light Co.* v. *City of Puyallup*, 51 F. 2d 688, 696 (C. A. 9, 1936) where the Court held:

> "The ruling of the court on this subject was again invoked by motion to strike out testimony already adduced upon this subject. The motion, however, did not specifically indicate the question and answers to be stricken out; moreover, as we have already pointed out, some of this evidence was introduced without objection."

This conflict is not apparent by the reading of the opinion of the Court of Appeals for the Seventh Circuit in the case at bar, which does not disclose that there was no objection made to the admission of the evidence which was later sought to be excluded on a motion to strike.

II B. In the matter of the time when a motion to strike may properly be made and upon whom the duty rests to secure proper instructions to the jury to exclude evidence.

It is also in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the question of proper practice and procedure relating to the time when a motion to strike and instructions to the jury to disregard evidence, should be made. At the stage of the case when the evidence went into the record, the charges of false arrest and false imprisonment were before the court and the jury. The evidence remained competent until the close of all of the evidence, when the court instructed the jury to find defendants not guilty as to the charges of false arrest and false imprisonment. It then became the defendant's duty to have requested the court to charge the jury to exclude from the record the evidence which was allowed in the case relating to the charges of false arrest and false imprisonment, and that the jury be instructed to disregard such evidence. *Tevis* v. *Ryan* (1914), 233 U. S. 273, 286. The defendant made no such request or motion. The motion to strike, the denial of which was held to be error by the Court of Appeals in the case at bar, was made only at the close of the plaintiffs' evidence when the court had overruled a motion for a directed verdict on the charges of false arrest and false imprisonment. That motion was not renewed at the close of all the evidence nor was any further request made to the court for a direction to the jury to disregard such evidence when the motion for directed verdict was granted on these charges.

The proper practice is set forth in the case of *Ross* v. *New York C. & St. L. R. Co.*, 73 F. 2d 187, 188 (C. A. 6,

1934) which is directly contrary to the decision in the case at bar. In that case the Court held:

> "The testimony as to the existence, promulgation and violation of the rule was admissible at the time it was received, for no violation of a safety act had been shown and the case was still being heard under the Federal Employers' Liability Act. When the Court charged the jury that no liability was imposed upon the defendant because of the Federal Employers' Liability Act, counsel for plaintiff should have then requested that all testimony as to the existence, promulgation and violation of the rule be excluded from the record and that the jury be instructed to disregard it. No such request was made."

The decision is also in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Ball* v. *Sheldon*, 218 Fed. 800, 801 (C. A. 2, 1914), where the Court held that the correct practice, when testimony properly admitted over objection has subsequently become incompetent is not to move to strike it out, but to ask an instruction to the jury to disregard it.

II C. As to the proper form of a motion to strike evidence.

The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal as to the proper form of a motion to strike, and is also in conflict with its own decision in the case of *Ford Hydro-Electric Co.* v. *Neely*, 13 F. 2d 361 (C. A. 7, 1926) (cert. den. 273 U. S. 723) where the court overruled a motion to strike testimony which had been preceded by objections to the evidence on the ground that the motion to strike was too general. The court in that case said at page 362:

> "The motion to strike out the evidence of Newton and Williams was properly overruled upon another ground. It was general and indefinite. A motion to strike out testimony should specifically point out the

> portion desired to be stricken. It is not incumbent upon the trial court to pick out testimony 'so far as relates' to a certain subject in order to rule upon the motion."

The motion to strike in the case at bar is too general to be allowed.

Also in conflict is the case of *Puget Sound Power & Light Co.* v. *City of Puyallup*, 51 F. 2d 688, 696 (C. A. 9, 1936).

The motion in the case at bar was general and specified no grounds in support of the motion, nor did it inform the court the precise testimony sought to be sticken (R. 180).

III.

There Is Also a Conflict With Other Courts of Appeal on the Same Matter Relating to a Proper Construction of Rule 61 of the Federal Rules of Civil Procedure Relating to Harmless Error.

The evidence held to be prejudicial by the Court of Appeals was admitted without objections; the defendant introduced similar evidence by its cross-examination and, after the motion to strike was overruled, did as a part of its case, introduce similar evidence in the form of testimony and by exhibits embodying evidence similar to that which was sought to be stricken. The cross-examination of the plaintiffs on their detention and questioning by the police officers, appears at pages 68 to 71 of the record. The introduction of similar evidence as a part of defendant's case appears at record pages 202 to 210. The introduction of defendant's exhibits No. 4 and No. 6 (R. 384C-384G) in the form of written statements taken from plaintiffs by the police officers, which statements fixed the time and place of the questioning of the plaintiffs at a

time prior to the signing of the complaints for examination by the defendant and disclosed their detention and questioning by police officers (R. 279). When it is considered that the Court's instruction to the jury that the only issue left for determination by the jury was the question of whether or not the defendant maliciously prosecuted plaintiffs by instituting the prosecution in the Municipal Court of Chicago (R. 325-326) followed further by the giving of defendant's instructions limiting the jury's consideration of the evidence solely to malicious prosecution, "following the signing of the complaint by defendant's employee" (R. 328-329), any error that existed was thereby rendered harmless.

The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals in the Third Circuit in the case of *Norwood* v. *Great American Indemnity Co.*, 146 F. (2d) 797, 799-800 (C. A. 3, 1944) where error on the part of the trial court in admitting hearsay testimony, was held harmless by reason of opposing counsel's cross-examination on the same matter; by his reference to the matter in interrogating his own witneses; and by his offer of records embodying the same matter. The court said at pages 799 to 800:

> "We think that the error (assuming it to have been such) in the trial court's admission of the insured's conversation with his wife concerning his injury became unsubstantial as the trial progressed.
>
> "The record discloses that on cross-examination of the plaintiff, appellant's counsel elicited substantially the same evidence concerning the accident and its effect, *e. g.*, the insured's complaining of a pain in his head and stating that his heart was missing a beat. In fact, the first question asked plaintiff on cross-examination concerned the insured's expressed apprehension of impending disaster. Further on in the trial, the insured's declarations as to his heart and impending disaster were referred to by appellant's

counsel in interrogating his own expert who utilized that information when giving his opinion that disease was the cause of the insured's death. The appellant also offered in evidence a documentary exhibit which recited substantially the same matters contained in the evidence whereof it now complains. In the light of these circumstances, it is our opinion that, whatever error may have been committed in admitting the evidence in the first instance, the error became harmless in the sense that it became unavailing to the appellant as ground for reversal."

We submit that under Rule 61 of the Rules of Civil Procedure, no clearer case of harmless error can be shown.

IV.

Whether by Permitting Defendant to Secure a Reversal for Error Defendant Itself Committed, the Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Require the Exercise of This Court's Power of Supervision to Prevent a Gross Miscarriage of Justice.

We recognize that certiorari has been sparingly granted for this reason. We earnestly believe that an examination of the alleged error of the District Court considered in the light of the entire record, discloses a clear departure by the Court of Appeals from the accepted and usual course of judicial proceedings.

The motion to strike, the overruling of which was held to be error by the Court of Appeals in the case at bar, related to testimony concerning the detention of the plaintiffs by Chicago police officers prior to the time of the signing of the complaints for examination by defendant.

The motion to strike that testimony was general. It specified no grounds in support of the motion, nor was

the exact testimony sought to be stricken specified for the trial judge. The entire evidence with respect to the arrest and detention by the police officers was admitted without a single objection by the defendant. The entire evidence was competent evidence since there was before the court and the jury at that time when the evidence was admitted, and at the time the motion to strike was made, the charges of false arrest and false imprisonment, as well as the charge of malicious prosecution. *Tevis* v. *Ryan*, 233 U. S. 273, 286; *Ross* v. *New York, C. & St. L. R. Co.*, 73 F. (2d) 187, 188 (C. A. 6, 1934). The defendant cross-examined the witnesses giving such testimony (R. 68-71). After the motion to strike had been denied by the District Judge, the defendant introduced similar evidence in the form of testimony and written exhibits embodying the same matter in the form of written statements taken from plaintiffs by police officers. These statements fixed the time and the place of the questioning at a time prior to the signing of the complaints for examination by the defendant, and disclosed plaintiffs' detention and interrogation by the police officers at the detective bureau (R. 202-210) (Ex. Nos. 4 and 6; R. 384C-384G).

At the close of all the evidence, the District Court granted the defendant's motion and instructed the jury to find the defendants not guilty as to the charges of false arrest and false imprisonment, advising counsel (R. 279):

> "By the Court: Now, I have considered this case, gentlemen. I do not believe there is sufficient evidence to go to the jury on the question of false arrest and false imprisonment, aside from the charge of malicious prosecution. In other words, I do not think there is evidence to go to the jury, sufficient evidence to go to the jury, on the question of agency of the officers prior to the time the defendant by its office manager signed the complaint.
>
> "Accordingly, I think that the only case which I can properly send to the jury is that involving the question

as to whether or not the defendant is guilty of malicious prosecution."

When the District Court made the above ruling, he informed both sides that the defendant was not liable for anything which took place prior to the signing of the complaints, or for the action of the police officers. Defendant made no request to the trial court to have the evidence relating to the charges of false arrest and false imprisonment stricken from the record or for an instruction to the jury to disregard such evidence.

The District Court instructed the jury that the only issue left for their determination was the question of whether or not defendants maliciously prosecuted each of the plaintiffs (R. 325). He further instructed the jury that plaintiffs must prove that in instituting the prosecution in the Municipal Court of Chicago, defendant acted wilfully, wantonly, and maliciously and without probable cause (R. 326). All of the instructions to the jury related solely to the conduct of the defendant in the signing of the complaints and in the prosecution of the plaintiffs (R. 325-330). There is not one word in the instructions of the Court to the jury relating to false arrest and false imprisonment or detention of the plaintiffs, other than in the instructions tendered by the defendant (R. 283) and given by the Court, favorable to the defendant; that the jury find the defendant not guilty as to the charges of false arrest and false imprisonment (R. 325) and the two identical instructions (R. 328-329) which the Court of Appeals has now held were not sufficient so as to be understood by the jury. These instructions were clear enough to be understood by the jury as we have amply shown under Point I and fixed the defendant's responsibility in the case solely "* * * to malicious prosecution of said plaintiff following the signing of the complaint by defendant's employee * * *" (R. 328-329).

In the closing arguments the attorneys for both plaintiffs and the defendant, informed the jury in simple, understandable language, that defendant was not liable for anything done by the police prior to the signing of the complaints and that nothing done by the police prior to the signing of the complaints was binding upon the defendant, nor was the defendant in any way liable for it (R. 294, 295-296); (R. 305-306, 312-313).

For any one of the above reasons, the action of the trial court in denying the motion to strike was proper.

When it is considered that in spite of all the foregoing reasons, the Court of Appeals held that the denial of the motion to strike constituted sufficient error to reverse and remand for a new trial, the defendant has been given the benefit of its own error. A gross injustice has been committed against the District Court and the trial jury, and a gross miscarriage of justice has been inflicted upon the plaintiffs.

WHEREFORE, petitioners pray for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the case entitled *Robert Stueber and James M. Stueber, plaintiffs-appellees* v. *Admiral Corporation, defendant-appellant*, No. 9658, in order that this case may be reviewed and determined by this Honorable Court.

ROBERT STUEBER AND
JAMES M. STUEBER,
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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 637

ROBERT STUEBER AND JAMES STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

Cases Cited.

STATUTES AND RULES CITED.

OTHER AUTHORITIES CITED.

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Supreme Court of the United States

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners file this brief in reply to the Brief dated April 12, 1949, submitted by the respondent.

I.

The Petitioners Were Deprived of the Right of Trial by Jury; the Respondents Have Not Met This Contention.

The Respondent's* Brief in Opposition to the Petition for Certiorari filed herein has completely avoided the question presented in the Petition for Certiorari, that is, that "plaintiffs* were deprived of their right to trial by jury by the Court of Appeals when that Court presumed the jury

* Plaintiffs-petitioners are hereinafter referred to as "plaintiffs," and respondent as "defendant."

not skillful enough to understand a simple instruction". That avoidance has been accomplished by the defendant's arrangement of the questions presented in the Brief in Opposition (p. 5) by which arrangement defendant completely eliminated that important question.

The defendant's position is very simple. It seeks to mislead this Court into the belief that the questions presented are procedural and that the important question that the Court of Appeals presumed the jury not skillful enough to understand the simple instruction discussed under Point I of the Reasons for Granting Petition for Certiorari (pp. 10-15) is not before this Court. The complete avoidance of this point and the defendant's limited discussion of the authorities relied upon by plaintiff in support thereof, only serves to emphasize the importance of this reason for granting certiorari.

The apparent reason for the failure to answer this point is the defendant's desire to conceal from this Court the fact that the two identical instructions criticized by the Court of Appeals in the case at bar, were two instructions given by the court at the defendant's request (R. 283, 328-329, 407). The tendered instructions were given by the District Judge, and as lawyers for defendant, they were certainly skilled enough to determine whether their own instructions were plain and clear for the purpose for which they were intended. If the instructions, which we agree are plain and clear, were not simple enough for the jury to understand as is now asserted by the Court of Appeals, then the defendant should bear the consequence of any insufficiency of its own instruction and it is contrary to every existing decision to penalize a plaintiff for the defendant's error.

We submit, however, that these instructions coming at a time when the court had directed the jury to find the

defendant not guilty as to the charges of false arrest and false imprisonment and had further instructed the jury that the only issue for the jury's determination was whether or not defendant maliciously prosecuted the respective plaintiffs (R. 325) which instructions limited for the jury's determination solely the issue of malicious prosecution following the signing of the complaints by defendant's employee and as applied to the record and to the evidence of the case, it is manifest that the jury understood these instructions and correctfully interpreted the charge of the trial court.

The Court of Appeals held in its opinion *that the issue was one properly for the jury, and that there was no error in the trial court's action in overruling a motion for directed verdict; that there was no error in the trial court's giving and refusing of instructions and the court's admission and exclusion of evidence with the sole exception here under discussion.* (Italics supplied.) It is evident that the Court of Appeals could not upset the verdict of the jury as being excessive, but it effected that result by erroneously granting a new trial. It thereby deprived plaintiffs of their right to trial by jury, in conflict with the Seventh Amendment to the Constitution of the United States.

The defendant in its Brief in Opposition concedes the correctness of the cases cited in support of plaintiff's position but takes refuge in the statement that the instructions, given by the District Court at the defendant's own request, are not plain and simple, and in so doing, attempt to distinguish the cases cited by the plaintiffs. A mere reading of the instructions referred to clearly negatives the defendant's contention.

II.

The Need for a Clarification by This Court of the Conflict That Exists Between the Several Courts of Appeal on Important Matters of Federal Practice and Procedure, Is Further Emphasized by Respondents.

The defendant insists that it followed the correct practice in its motion to strike evidence admitted without objection. The motion to strike was made at the close of the evidence on the part of the plaintiff following the denial by the trial court of a motion for directed verdicts (R. 180). There was then before the jury the charges of false arrest, false imprisonment and malicious prosecution.

In support of its position defendant cites a general rule found in 64 C. J. p. 203. It is an imposition on this Court to cite general rules from Corpus Juris and to deliberately omit qualifications therein stated. The rule quoted by the defendant (Brief in Opposition, p. 10) is qualified by the following additional language which the defendant deliberately and improperly omitted (64 C. J. p. 205):

> "Subject to the rules hereinafter stated as to the *necessity of a previous objection*, and as to the *time of the making of the motion* and the *sufficiency of the motion* evidence may be stricken out on motion. * * *" (Italics supplied.)

The italicized portion of the foregoing quotation emphasizes three reasons for the impropriety of the defendant's motion to strike made at the close of the plaintiff's case.

We have discussed at length these identical points at pages 15 to 19 of the Petition for Certiorari. In that discussion we showed that the Court of Appeals' decision in the instant case is in conflict with all the decisions cited and discussed under Point II of the Petition (Pet'n for Cert., pp. 15-19).

On the trial, the defendant made no objection to any of the plaintiff's evidence, including that which the Court of Appeals held should have been stricken. The motion to strike the evidence was made at the close of the plaintiffs' case (R. 180-181). The District Judge had overruled a motion for a directed verdict on all the issues in the case. A motion to strike and a request for instructions to the jury to disregard the evidence relating to the issues of false arrest and false imprisonment was not made at the close of the evidence when the court granted the motion of the defendant for a directed verdict on the charges of false arrest and false imprisonment. The court's discussion of its ruling at that time with counsel invited such a request and instructions (R. 281-284).

The defendant was satisfied with its own tendered instructions which were given by the District Court and which the Court of Appeals though holding said instructions to properly state the law, criticise as insufficient. There was no request made by defendant at any time in the trial to have the jury disregard this evidence other than by its own tendered and given instructions.

The form of the motion to strike the evidence was improper in that it was too general. It did not inform the District Court of the precise evidence sought to be stricken (R. 180).

Defendant cites *Wendell* v. *Willets,* 183 Fed. 1014. This decision actually supports the contention of the plaintiff. There the Court stated:

> "Slight errors will creep into any trial of length, such as this was, as will more or less immaterial evidence, *the bearing of which cannot be actually determined until the case is ready for submission.* If such evidence is apparently competent at the time a motion should be made to strike out or a request made for instructions to the jury to disregard the same, if in

> the course of the trial it becomes evident that the evidence is in fact immaterial and is or may be in fact prejudicial." (Italics supplied.)

The evidence remained competent until the close of all of the evidence, when the court instructed the jury to find defendants not guilty as to the charges of false arrest and false imprisonment. It then became the defendant's duty to have requested the court to charge the jury to exclude from the record the evidence which was allowed in the case relating to the charges of false arrest and false imprisonment, and that the jury be instructed to disregard such evidence.

Defendant's citation of *Frankfurter* v. *Bryan,* 12 Ill. App. 549 does not bind the Federal Courts on proper procedural practice to be applied in the Federal Courts. Nor is it in point on the facts, since in that case at the close of the plaintiff's case one of the defendants was dismissed. Under those circumstances the motion to exclude from the jury's determination evidence relating to the action of the dismissal of defendant was proper; but for that reason the case is not analogous.

Defendant deliberately, improperly and contemptuously resorts to a misstatement of the decision in *Ross* v. *N. Y. C. & St. L. R. Co.*, 73 F. 2d 187 (C. A. 6) as appears on page twelve of its Brief in Opposition. Directly contrary to the defendant's statement that there had been no timely objection or that there had been a failure to object, the principal claim of error before the Court of Appeals in the *Ross* case was that the trial court had permitted evidence to be received over objection and exception as to the existence and promulgation of a certain safety rule. At page 187 the following language appears:

> "The principal claim of error made on behalf of the plaintiff is that the trial court erred prejudicially

> in *permitting evidence to be received over objection and exception* as to the existence and promulgation of a certain safety rule of the defendant claimed to have been violated by the plaintiff." (Italics supplied.)

The defendant's discussion of the case of *Ball* v. *Sheldon*, 218 Fed. 800 (C. A. 2) is likewise deliberately distorted. That case was cited for the correct rule to be followed with respect to evidence admitted without objection or admitted properly over objection and which later becomes incompetent; that is, that instructions be sought that the jury disregard the evidence. The Court in that case said:

> "The correct practice, when testimony properly admitted over objection has become incompetent, is not to move to strike it out, but to ask the court to direct the jury to disregard it. *Marks* v. *King*, 64 N. Y. 628; *Homnes* v. *Moffatt*, 120 N. Y. 159, 24 N. E. 275."

Again a deliberate falsehood is contained on page 13 of defendant's brief in opposition when they say "when defendant first objected to it (the evidence) by a motion to strike." (Br. in opposition p. 13.) The defendant never objected to the evidence. A motion to strike is not an objection.

The statement to the court that the "prejudicial evidence was incompetent when defendant first objected to it by a motion to strike" is not a correct statement of law or fact. The evidence was competent since the court had overruled motions for directed verdicts on all the issues in the case. The evidence could only have become incompetent when the motion for directed verdict was allowed as to the charges of false arrest and false imprisonment.

The defendant's brief in opposition presents no authorities which resolve the conflict on these matters existing between the several courts of appeal. Defendant's

misleading discussion of the authorities relative to the proper practice relating to the exclusion of evidence and to motions to strike and the duty of securing proper instructions from the court to the jury, emphasize the need for a clarification by this Court of that problem.

A conflict does exist between the Courts of Appeal as we have amply demonstrated in our reasons in support of the Petition for Certiorari (pp. 15-19). The clarification of this conflict requires the granting of certiorari and of a decision by this court.

III.

The Conflict Between McCandless v. U. S., (1936) 298 U. S. 342 and Berger v. U. S., (1935) 295 U. S. 78, Requires Reconciliation by a Decision of This Court.

Defendant's attempt to dispose of plaintiffs' contention relating to a proper construction of *Rule 61 of the Federal Rules of Civil Procedure* relating to harmless error by the citation of *McCandless* v. *U. S.*, 298 U. S. 342. In so doing there is brought into sharp focus the need for the settlement of the conflict between the Court of Appeals for the Seventh Circuit and other Courts of Appeal on the same matter. The decision of the Court of Appeals for the Seventh Circuit is in conflict with other Courts of Appeal as well as its own decision in the following cases: *Norwood* v. *Great American Ind. Co.*, 146 F. (2d) 797 (C. A. 3, 1944); *Keller* v. *Brooklyn Bus Corp.*, 128 F. (2d) 510 (C. A. 2, 1942); *Garree, et al.* v. *McDonell, et al.*, 116 F. (2d) 78 (C. A. 7, 1940).

The conflict between these Circuits is neither met nor discussed by the defendants. It therefore requires the decision of this Court reconciling this conflict.

In *Matter of Barnett,* 124 F. (2d) 1005, 1011 (C. A. 2, 1942), Circuit Judge Frank said:

> "* * * the doctrine of 'harmless error', * * * to the chagrin of those devoted to a conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which do no real harm."

To say that the alleged error in the instant case affected the substantial rights of the defendant, requires an examination of the entire record. Such an examination discloses that the alleged error did no real harm nor did it affect the substantial rights of the defendant. The alleged error relied upon by the defendant for reversal was created by the defendant itself in failing to object to certain allegedly prejudicial testimony; and in cross-examining thereon; in introducing similar evidence; in moving at the close of the plaintiff's case to strike certain evidence admitted without objection; in failing to renew such motion at the close of all the evidence; and in tendering instructions given by the District Court limiting the consideration to be given by the jury to such evidence. *Garree, et al.* v. *McDonell, et al.,* 116 F. (2d) 78 (C. A. 7, 1940).

The Court of Appeals thereafter predicated its reversal upon two identical instructions tendered by the defendant and given to the jury by the District Judge, which the Court of Appeals though saying are a proper statement of the law, has criticized as not being sufficient to remedy the alleged error relating to the overruling of the defendant's motion to strike certain testimony. The Court of Appeals has been misled by the defendants to make it appear that the criticized instructions were given at the request of the plaintiff and not at its own request. *The same deliberate intention to mislead this Court* is demonstrated in the defendant's discussion of said instructions (Resp. Brief, pp. 15-16) where it is nowhere admitted or even indicated that

the instructions that they there criticize were the defendant's own. They are criticized as being insufficient and pointed to as error, allegedly affecting defendant's substantial rights, *as flagrantly as if the instructions had been tendered not by defendant but by the plaintiff*. If the defendant's substantial rights were indeed affected then the defendant has succeeded in obtaining a reversal by error of its own creation which it has deliberately made to appear as error of the plaintiff.

In effect, the defendant up to this point, has succeeded in not alone effecting a reversal of the judgment of the District Court by deliberately misleading the Court of Appeals, but has successfully defeated the intentions of *Rule 1 of the Federal Rules of Civil Procedure* "* * * to secure the just, speedy, and inexpensive determination of every action", but as well of *Rule 61 of the Federal Rules of Civil Procedure* relating to harmless error, by conduct richly deserving of condemnation and severe censure.

Neither the *McCandless* v. *U. S.*, 298 U. S. 342 case, nor any other decision of this Court was intended to bring about such an unjust result nor to invite nor encourage a miscarriage of justice by evasion or trickery on the part of lawyers in either trial or appeal.

In answer to our contention that the alleged error of the District Court in denying defendant's motion to strike was rendered harmless under *Rule 61 of the Federal Rules of Civil Procedure* in the light of the record that discloses that the defendant introduced similar evidence, cross-examined on the testimony it later sought to have stricken, and tendered instructions which were given by the District Court limiting the consideration to be given to this evidence, the defendant relies on the *McCandless* case, 298 U. S. 342 requiring an "affirmative showing that the evidence was not prejudicial".

This only emphasizes not only the need to reconcile the conflict between the several Courts of Appeal on *Rule 61 of the Federal Rules of Civil Procedure*, but for a decision of this Honorable Court reconciling its decision in the *McCandless* case with its decision in the case of *U. S.* v. *Berger*, 295 U. S. 78 (1935), which sought to put an end to the too rigid application of the presumption of error rule, and to establish the more reasonable rule that if, upon an examination of the entire record, substantial error does not appear, the error must be regarded as harmless.

IV.

Permitting Respondent to Secure a Reversal for Its Own Error Is Such a Clear Departure from the Accepted and Usual Course of Judicial Proceedings as to Require the Exercise of this Court's Power of Supervision to Prevent a Gross Miscarriage of Justice.

The Brief in Opposition avoids a direct answer to the contention that the defendant has secured a reversal for errors in the District Court that the defendant itself created. When it is considered that the actual basis for the Court of Appeals' reversal of the District Court in the instant case is that two identical instructions of the District Court, which were given at the defendant's request (R. 283, 328-329, 407) were not clear and specific enough to properly advise the jury as to what was meant by the trial court, it is plainly apparent that the reversal is predicated upon the defendant's own error. The legal effect of this result is to permit the defendant to profit by its own error at the expense and to the detriment of the plaintiffs.

Such a result is contrary to and a clear departure from the accepted and usual course of judicial proceedings, amounts to a gross miscarriage of justice, and establishes

so undesirable a precedent as to require the exercise of this Court's power of supervision to correct.

Conclusion.

It is respectfully submitted that a writ of certiorari be granted.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 637

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

OPPOSING BRIEF OF RESPONDENT.

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April 12, 1949.

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TABLE OF CONTENTS.

Cases Cited.

Statutes and Rules Cited.

Other Authorities Cited.

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vs.

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Respondent.

OPPOSING BRIEF OF RESPONDENT.

OPINION OF COURT OF APPEALS.

The opinion of the Court of Appeals for the Seventh Circuit was issued on January 5, 1949 (R. 438). Judgment of reversal and remandment for a new trial was entered on the same date (R. 444). Petition for rehearing was denied on February 3, 1949 (R. 445).

The opinion is reported at 171 F. (2d) 777. It is also quoted in full in the Record, filed by plaintiffs-petitioners,* at pages 438 to 443, inclusive.

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* Plaintiffs-petitioners are hereinafter referred to as "plaintiffs," and respondent as "defendant."

SUMMARY OF MATTER INVOLVED.

The Court of Appeals reversed a judgment for plaintiffs, entered in the trial court on jury verdicts, upon the ground that in denying defendant's motion to strike certain prejudicial evidence introduced by plaintiffs, the trial court committed reversible error. The evidence in question embraced some sixteen pages of plaintiffs' testimony concerning mistreatment alleged to have been suffered by them at the hands of police officers of the City of Chicago (R. 46-56, 102-108). Defendant's motion to strike was made and overruled at the close of plaintiffs' case (R. 180-181).

The plaintiffs contend here, as they did in the Court of Appeals: First, that the motion in question was properly denied solely because of alleged technical defects as to the time and form of the motion; and second, that, assuming the trial court was not thus saved from error, the error was later cured, principally through an instruction relating to damages which the trial court gave on submitting the case to the jury.

The Court of Appeals overruled these two contentions. From this spring plaintiffs' claims that a writ of certiorari should be granted.

STATEMENT OF THE CASE.

It is not necessary to restate the facts fully in order to enable this Court to pass upon plaintiffs' petition. A brief statement, however, of facts giving the setting in which the prejudicial evidence appears may be of assistance to the Court.

An outline of these facts is as follows:

On May 1, 1946, the defendant, Admiral Corporation, a radio manufacturer, suffered a burglary at its warehouse in Chicago, Illinois (R. 236-237). A large quantity of radio loud speakers, phonograph needles and wire was stolen (R. 240, 246).

Police officers from the Chicago Detective Bureau promptly commenced an investigation to locate the stolen property (R. 199, 201). Their investigation eventually led them to plaintiffs' place of business (R. 200, 201). It was a wholesale business called "Chicago Radio Parts Supply" and was located in a basement store in Chicago (R. 45).

On Saturday, September 21, 1946, the police called at plaintiffs' place of business and on the same day arrested plaintiffs, without a warrant, and lodged them in jail (R. 41-42, 202-211, 251-252). Plaintiffs were held in jail from Saturday until the following Monday, September 23, under conditions which plaintiffs vividly described in their testimony and which will be referred to below in this brief.

On Monday, September 23, the police phoned Bernard Heinrich, an employee of the defendant, and asked him to come to the Detective Bureau. At the Detective Bureau, Heinrich identified the property found by the police in plaintiffs' hands as a part of the stolen property (R.

251, 252). Thereupon, at the request of the police, he signed complaints charging plaintiffs with receiving stolen property, and plaintiffs were released on bond (R. 213-215).

Up to the time the police called Heinrich on Monday, defendant had no knowledge that an arrest had been made or was even contemplated. Thus, defendant did not know about or participate in anything which took place prior to the time when defendant's employee came in and signed the complaints on that day.

Among the things which took place prior to the signing of the complaints were the arrest and imprisonment of plaintiffs, without a warrant. Among them, too, were the alleged acts of mistreatment to which plaintiffs testified they were subjected during their detention by the police from Saturday until Monday (R. 46-56, 102-108).

Plaintiffs' testimony concerning the alleged mistreatment suffered by them during their detention is thus summed up by the Court of Appeals in its opinion (R. 441) (171 F. (2d), at pp. 779-780):

> "The court received evidence of plaintiffs' alleged mistreatment by the police during the two days when they were in custody, before defendant was advised of their detention and caused the complaints to issue. Plaintiffs testified that the police officers placed them in separate cells, where they had no facilities for sleeping or bathing and no toilet; that they were later removed to another room and questioned, and then to other cells. According to Robert, he was imprisoned some three or four hours with a number of other prisoners. The later confinement places were, they said, 'much filthier' than the ones in which they were first lodged. Finally Robert was moved to a large cell, in which were 'several drunken people' who 'looked like bums' and 'like they were infested with all types of vermin.' Their pictures were taken with the Svobodas, and they were put through 'show-ups' under flood lights. The coffee was not 'fit to drink'; they

were offered bread and bologna sausage 'of which even the smell nauseated' them. These and other revolting details of alleged mistreatment were received in evidence."

This testimony of plaintiffs—concerning their detention from Saturday until Monday when the complaints were signed—was the evidence which defendant sought, by motion, to have stricken at the close of plaintiffs' case. And it was the trial court's denial of this motion which was held by the Court of Appeals to be reversible error.

QUESTIONS PRESENTED.

Plaintiffs divide their petition into four separate points or sections (Pet'n for Cert., I through IV, pp. 10-24). These involve but two main questions:

First, whether, in refusing to sustain the trial court's erroneous denial of defendant's motion to strike upon the sole ground that the motion was improper as to time and form, the Court of Appeals has rendered a decision in conflict with other decisions of Courts of Appeals on the same matter,—thus warranting the allowance by this Court of a writ of certiorari.

Second, whether, in concluding that this error of the trial court was not later cured, the Court of Appeals has rendered a decision which is in conflict with decisions of this Court,—thus warranting the allowance of the writ.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals Correctly Decided That Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Proper in Time and Form, and That the Trial Court's Denial of It Constituted Reversible Error; and This Decision Is Not in Conflict With Any Other Decisions of Courts of Appeals on the Same Matter.

The evidence which the trial court refused to exclude is, on its face, highly inflammatory and prejudicial. Plaintiffs do not deny this. The Court of Appeals has accurately characterized it in its opinion as "most prejudicial to defendant."

Plaintiffs' contentions (Points II and IV, Pet'n for Cert., pp. 15-19, 21-22) concerning the alleged procedural impropriety of defendant's motion to strike are without merit. Defendant's motion was presented at the close of plaintiffs' case. This was the moment when it first became apparent that the prejudicial evidence in question could not be charged to the defendant. Hence, defendant's motion was timely made.

There is no merit to plaintiffs' claim that the motion was "too general." For it is apparent from the record in this case that both the trial court and plaintiffs were fully aware of the nature and extent of the testimony which defendant sought, by its motion, to strike from the record. The cases cited and relied upon by plaintiffs in support of the alleged procedural impropriety of defendant's motion are not in point. None of them presents a situation involving evidence remotely similar, in inflammatory character,

to the evidence involved in the case at bar. Nor do any of them present a question of trial technique which is parallel to the one here involved.

II.

The Court of Appeals Correctly Decided That the Trial Court's Error in Denying Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Not Later Cured; and This Decision Is Not in Conflict With Any Applicable Decisions of This Court.

Plaintiffs' contention (Point I, Pet'n for Cert., pp. 10-15) that the trial court's error was later cured by a form of instruction on damages is without merit. The instruction in question was tendered and given in the light of the trial court's ruling on the motion for directed verdicts, made at the close of all the evidence, as to the false arrest and imprisonment charges. It was directed to the alleged *illegal* acts of arrest and imprisonment without a warrant. It did not tell the jury to disregard the evidence as to all acts of the police which occurred during plaintiffs' detention up to the time when the complaints were signed, or to exclude any of such evidence in determining whether defendant was guilty of malicious prosecution.

The decisions relied upon by plaintiffs with respect to this contention are not in point. They should be confined to the particular situations there presented, which are unlike anything here involved.

Plaintiffs' contention (Point III, Pet'n for Cert., pp. 19-21) that the trial court's error was rendered "harmless," within the contemplation of Rule 61 of the Federal Rules of Civil Procedure for U. S. District Courts, is likewise without merit. That the "harmless error" principle is no sup-

port for plaintiffs' contention is established by decisions of this Court.

Plaintiffs' contention to the effect that the remarks of counsel cured the error is without substance. It is the Court's instructions, and not counsel's predictions as to what they may be, which determine the sufficiency of the Court's charge to the jury.

The Court of Appeals, contrary to plaintiffs' contention, stayed squarely within the limits of "the accepted and usual course of judicial proceedings"; and there is no warrant for the issuance of a writ of certiorari in this case.

ARGUMENT.

I.

The Court of Appeals Correctly Decided That Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Proper in Time and Form, and That the Trial Court's Denial of It Constituted Reversible Error; and This Decision Is Not in Conflict With Any Other Decisions of Courts of Appeals on the Same Matter.

The evidence which the trial court refused to exclude is, on its face, highly prejudicial to the defendant. It is characterized by the Court of Appeals in its opinion as "most prejudicial to defendant" (R. 442).

Plaintiffs do not deny this, but rely instead on the alleged procedural impropriety of defendant's motion as grounds for claiming the motion was properly denied.

Under Point II and again under Point IV of their petition (Pet'n for Cert., pp. 15-19, 21-22), plaintiffs repeat the same contentions in this regard as they presented to the Court of Appeals. They include the claim that the motion should have been made sooner; that it should have been made later; that it should not have been made at all, the defendant being obliged to rely upon its right to tender instructions to the jury at the close of the case. Plaintiffs also claim that the motion was "too general" (Pet'n for Cert., pp. 16, 18). But in holding that the denial of the motion to strike was reversible error, the Court of Appeals rejected all of these contentions.

As pointed out by the Court of Appeals in its opinion (R. 441-442) (171 F. (2d), at p. 780):

"Defendant had in no way participated in or in

> any manner been responsible for the actions of the police. Prior to Monday morning, September 23, when defendant's attention was first called to the matter, it had no knowledge that an arrest had been made or was even contemplated. It did nothing to initiate or inspire what happened in the two preceding days. The police officers derived their authority solely from the State, of which, when they performed their functions, they were agents; they were not acting as agents or employees of defendant. As said in *Chesapeake & Potomac Telephone Co.* v. *Lewis*, 69 App. D. C. 191, 99 F. 2d 424, at page 425: 'Mere information to the officers of the law by a citizen, tending to show that an offense has been committed and that some person named may be suspected of its commission, is not sufficient, of itself, to warrant the inference that the informer or his agents participated in the unlawful arrest and imprisonment of the accused by the officer.'
>
> "It cannot be questioned, we think, that this evidence was most prejudicial to defendant. The court denied a motion to strike it. We think the motion should have been allowed."

Contrary to plaintiffs' claim, the action of the defendant in making the motion in question falls squarely within the limits of correct trial technique. As defendant pointed out to the Court of Appeals, the applicable general rule is thus stated in 64 C. J. at p. 203:

> "A motion to strike out *is necessary* when evidence apparently proper when admitted is subsequently shown to be objectionable * * * " (Italics supplied).

The timeliness of defendant's motion is supported by Federal as well as State authorities. In *Wendell* v. *Willetts*, 183 Fed. 1014 (C. Ct., N. Y.), it was held that where evidence which is apparently admissible when presented is later found to be immaterial, a motion to strike is proper. And it is supported by *Frankfurter* v. *Bryan*, 12 Ill. App. 549, 554. There the court had before it a

situation very similar to the one at bar. It was an action for false imprisonment and malicious prosecution brought by plaintiff Bryan against defendants Frankfurter, Blocks and a justice of the peace named Harrar. At the close of plaintiff's case, Harrar was dismissed. There was no evidence that either Blocks or Frankfurter had in any manner directed or participated in Harrar's action in causing plaintiff to be jailed and to suffer various other acts of mistreatment.

Defendants Frankfurter and Blocks thereupon moved to exclude from the jury all of the evidence relating to the wrongs suffered by plaintiff at Harrar's hands.

The lower court overruled the motion. The Appellate Court held that this was error. And in reversing the judgment for plaintiff and remanding for a new trial, the court said (12 Ill. App., at p. 554):

> "That motion was denied by the court, and there was not even an instruction by the court directing the jury to disregard it; and if there had been, it would not cure the error. *The Lafayette, B. & M. R. R. Co.* v. *Winslow,* 66 Ill. 219; *Lycoming Fire Ins. Co.* v. *Rubin,* 79 Ill. 402."

Moreover, the cases relied upon by plaintiffs in their petition do not bear out the claimed conflict with other decisions of Courts of Appeals which is a paramount requirement under Rule 38, paragraph 5(b) of this Court. These cases may be dealt with very briefly.

In the first place, none of them involved evidence which is remotely similar, in inflammatory character, to the evidence which the trial court erroneously refused to strike out in the case at bar. In the second place, even disregarding this important difference, they cannot possibly be called decisions upon "the same matter" as is involved in the case at bar (Rule 38, par. 5(b) of this Court).

Brockett v. *New Jersey Steam-Boat Co.*, 18 Fed. 156 (C. Ct., N. Y.), cited by plaintiffs, is not in point (Pet'n for Cert., p. 16). It involved a failure of the complaining party to make timely objection to evidence, the admissibility of which could quite apparently have been determined at the time it was offered. Defendant's motion in the case at bar, on the other hand, was timely made. It was timely because it was made "when evidence apparently proper when admitted" was "subsequently shown to be objectionable"—that is, when, at the close of plaintiffs' case, it for the first time became apparent that the prejudicial testimony was not chargeable to the defendant.

Tevis v. *Ryan*, 233 U. S. 273, cited by plaintiffs (Pet'n for Cert., pp. 12, 17, 22), presented a question as to the proper method of instructing the jury, at the close of all the evidence, with regard to limiting the effect of certain documentary exhibits. It is no authority against defendant's right to strike prejudicial evidence at any proper time during the hearing of evidence.

Ross v. *New York C. & St. L. R. Co.*, 73 F. (2d) 187 (C. A. 6), cited by plaintiffs (Pet'n for Cert., pp. 12, 17, 18, 22), involved evidence as to which no timely objection, by motion to strike or otherwise, had been made. The court merely held that, having failed to object at all before, it was necessary for plaintiff to request an instruction on submission of the case to the jury that the evidence be excluded in order to assert error in that connection.

Ball v. *Sheldon*, 218 Fed. 800 (C. A. 2), cited by plaintiffs (Pet'n for Cert., p. 18), is likewise without bearing on anything here presented. It related to testimony which, as described in the court's own words, was "properly admitted over objection." In the case at bar, the preju-

dicial evidence was incompetent when defendant first objected to it by a motion to strike.

Plaintiffs contend that defendant's motion to strike should not have been granted because it was "too general" (Pet'n for Cert., pp. 16, 18-19). But, as defendant pointed out to the Court of Appeals, it is perfectly clear from the record in this case that defendant's motion and the ensuing argument adequately informed both the trial court and the plaintiffs of the evidence sought to be stricken (R. 180-181). This was sufficient. *Wade* v. *Whitsitt,* 9 Tenn. App. 436, 445-446 (cert. den. by Tenn. Sup. Ct., April 13, 1929); *Nashville, C. & St. L. Ry. Co.* v. *York,* 127 F. (2d) 606. The cases of *Puget Sound Power & Light Co.* v. *City of Puyallup,* 51 F. (2d) 688 (C. A. 9), and *Ford Hydro-Electric Co.* v. *Neely,* 13 F. (2d) 361 (C. A. 7), relied upon by plaintiffs, are accordingly inapplicable (Pet'n for Cert., pp. 16, 18, 19). There is no merit to plaintiffs' claim that the Court of Appeals' decision in the case at bar raised conflict either with the Ninth Circuit's or its own decisions.

It is submitted that the Court of Appeals correctly decided that defendant's motion to strike was proper in time and form, and that its decision raises no questions of conflict with any other Court of Appeals decision.

II.

The Court of Appeals Correctly Decided That the Trial Court's Error in Denying Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Not Later Cured; and This Decision Is Not in Conflict With Any Applicable Decisions of This Court.

Plaintiffs contend under Point I of their petition (Pet'n for Cert., pp. 10-15), as they did before the Court of Appeals, that the error committed by the trial court was

later cured by a form of instruction on damages which was given by the trial court on submission of the case to the jury.

It should be borne in mind that only if the defendant's motion to strike the prejudicial testimony had been granted would the defendant have been entitled to an instruction that the jury should disregard completely the evidence in question. By denying defendant's motion to strike, the trial court in effect ruled that defendant was not entitled to such an instruction. And the defendant was bound by the court's ruling in that regard.

The damage instruction was given not to "cure" the earlier error but in the light of another ruling of the trial court. It was the ruling on the motion, made at the conclusion of the entire case, for directed verdicts with respect to the false arrest and false imprisonment charges. On granting this motion, the trial court directed the jury to find the defendant not guilty as to these charges. These alleged illegal acts of arrest and imprisonment without a warrant were committed by the police prior to the signing of the complaints upon which the charge of malicious prosecution was based. The instruction in question simply told the jury that they were not to consider in fixing the amount of the damages any *illegal* acts committed prior to the signing of the complaints. It did not tell the jury to disregard the evidence as to *all* acts of the police which occurred during plaintiffs' detention up to the time when the complaints were signed, or to exclude any of such evidence in determining whether defendant was guilty of malicious prosecution. As the Court of Appeals properly found, the instruction did not cure the error.

Plaintiffs assert that the trial court's instructions, on their face, satisfy the "criticism" which the Court of Appeals has made of them in its opinion (Pet'n for Cert.,

pp. 13-15). But in doing this, plaintiffs omit from their twice repeated quotation from the Court of Appeals' opinion (Pet'n for Cert., pp. 7-8, 13-14) this significant portion (R. 442) (171 F. (2d), at p. 780):

> "* * * All of the prejudicial evidence as to what occurred before the defendant was called in and asked to sign the complaint, remained in the record and, as we have said, it could only prejudice the jury. To eliminate the prejudicial effect of this testimony, it was necessary that the court charge the jury that the acts of the police could in no wise be considered not only in fixing damages but also in determining whether plaintiffs were [defendant was] guilty of malicious prosecution, that is, whether defendant had reasonable cause to believe that plaintiffs were guilty or without such cause, maliciously caused plaintiffs to be prosecuted. In other words the charge did not remedy the error innate in the refusal to exclude prejudicial testimony."

Thus, if any further answer were needed, the Court of Appeals has furnished it in the above portion of its opinion which was omitted by plaintiffs.

Plaintiffs rely upon the case of *Pennsylvania Co.* v. *Roy*, 102 U. S. 451 (Pet'n for Cert., pp. 11-12), in support of their claim that the Court of Appeals' decision in the case at bar is in conflict with decisions of this Court. But an examination of that case shows, if anything, that the contrary is true. The plaintiff there had introduced testimony with reference, first, to his financial condition and, second, to the number and ages of his children, with the manifest object of impressing the jury with his family responsibilities.

The trial court had given the following instruction to the jury at the conclusion of the case (102 U. S., at p. 458):

> "But the jury should not take into consideration any

> evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being, how much his ability to earn money in the future has been impaired."

The Court held that this was a sufficient exclusion of the plaintiff's testimony concerning his pecuniary condition, and the language quoted at length in the plaintiffs' petition (Pet'n for Cert., pp. 11-12) was used by the Court in reaching this conclusion. But further examination of the decision discloses that the Court took a different view as to the sufficiency of the trial court's charge in excluding the other evidence. The Court held that the charge was not sufficient to exclude from the jury's consideration the testimony of plaintiff relative to the number and ages of his children. And the Court accordingly reversed the case for a new trial on that ground.

The cases of *Rogers* v. *The Marshal*, 68 U. S. 644, *First Unitarian Soc.* v. *Faulkner, et al.*, 91 U. S. 415, and *Fairmount Glass Works* v. *Cub Fork Coal Company*, 287 U. S. 474, relied upon by plaintiffs (Pet'n for Cert., pp. 14, 15), are likewise inapplicable. The situations presented in them, like the types of evidence involved, are too remote to warrant comment. At most they establish that there are cases where an instruction to the jury can be called plain and clear; that, in particular situations, appellate courts may be called upon to say about juries and courts what they did in those cases.

Under Point III (Pet'n for Cert., pp. 19-21), plaintiffs contend that the trial court's error in denying defendant's motion was rendered "harmless" within the contemplation of Rule 61 of the Federal Rules of Civil Procedure for the United States District Courts. They say that this resulted from defendant's cross-examination, from defend-

ant's introduction of "similar evidence," and from the giving of the damage instruction already referred to. The short answer to the first two claims is that, as is clearly disclosed by an examination of the record, there was nothing in the cross-examination or the later proof by defendant which could possibly be construed as neutralizing the effect upon the jury of the inflammatory evidence which the trial court improperly refused to exclude. The last contention, relative to instructions, has been fully answered above (this Brief, pp. 13-15).

The case relied upon by plaintiffs,—*Norwood* v. *Great American Indemnity Co.*, 146 F. (2d) 797 (C. A. 3) (Pet'n for Cert., p. 20),—is plainly inapplicable to the case at bar. It simply holds that, on the record there presented, hearsay testimony concerning decedent's conversation with plaintiff, his wife, about his injury became insubstantial. The reason for this was, as is evident in the quoted portion of the court's decision (Pet'n for Cert., pp. 20-21), that the hearsay "proof" concerning decedent's injury was brought in later by proper evidence. There was no such situation involved in the case at bar.

On the other hand, the fact that the "harmless error" principle is no support for plaintiffs' contention is established by decisions of this Court. In *McCandless* v. *United States*, 298 U. S. 342, the Court had occasion to consider the construction of Section 269 of the Judicial Code (28 U. S. C. Sec. 391) upon which Rule 61 is patterned. This Court said (298 U. S., at pp. 347-348):

> "* * * That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it

affirmatively appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26."

In the light of these views, it is apparent that the Court of Appeals could only have concluded on this record that the trial court's error related to the substantial rights of the parties, and that it did not affirmatively appear that such error "was not prejudicial."

Under Point IV of their petition (Pet'n for Cert., pp. 21-24), plaintiffs reiterate the various contentions which have already been fully answered. To these they add the contention that the insufficiency in the court's charge was remedied by argument of counsel. This contention, too, is without merit. Whatever may be plaintiffs' theory as to the import of the remarks of counsel, clearly it is the instructions given by the court which determine the sufficiency of the charge,—not the predictions of counsel as to what those instructions might be.

It is submitted that, contrary to plaintiffs' contention under their Point IV, the Court of Appeals in all respects stayed squarely within the limits of "the accepted and usual course of judicial proceedings," and the exercise of this Court's power of supervision on any such ground is utterly without warrant.

Conclusion.

As has been demonstrated, there was ample justification, in the record in the case at bar, for the Court of Appeals' decision that the judgment of the trial court should be reversed and a retrial ordered.

The trial court's denial of defendant's motion to strike left before the jury evidence which was bound to preju-

dice it. There was nothing in the case which can possibly be construed as eliminating the inflammatory effect of this evidence in the minds of the jury. Much less can it possibly be claimed that there was any *affirmative* showing that the evidence "was not prejudicial." *McCandless v. United States*, 298 U. S. 342, 348.

The undisputed evidence established that the plaintiffs had bought property, afterwards identified as a part of that stolen from defendant, under highly suspicious circumstances. Plaintiffs knew of the Admiral burglary and of the theft of the property involved in it. What they learned following their purchase and before their arrest amply supported the conclusion that they were continuing to hold stolen property with knowledge that it was stolen (R. 83-84, 85, 119, 131, 133, 203, 225; Def.'s Exs. 5 and 6, R. 384-C to 384-G). In the face of great doubt as to plaintiffs' right to recover at all, the jury returned verdicts totaling $32,500.00. Clearly there was justification for the close scrutiny given the record by the Court of Appeals and for its decision upon that record.

It is submitted that the Court of Appeals correctly concluded that the judgment of the trial court should be reversed and the cause remanded for a new trial; and that there is nothing in the case which warrants the allowance by this Court of a writ of certiorari. Plaintiffs' petition should accordingly be denied.

Respectfully submitted,

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